BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIRINDA SIOUX SMITH, Claimant, v. DOT FOODS, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-007874** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JUL 03 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Twin Falls, Idaho, on July 7, 2022. Rachel Miller represented Claimant at the hearing. Lora Breen represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on April 17, 2023.

ISSUES

The noticed issues for resolution from the bifurcated hearing are:

1. Whether Claimant suffers from a compensable occupational disease; and
2. Whether Claimant's claim is barred by the *Nelson* doctrine.

CONTENTIONS OF THE PARTIES

Claimant asserts she contracted cervical and lumbar radiculitis while working for Employer due to the nature of her work and her bodily positioning for long periods of time during her shifts. She also contends the *Nelson* doctrine does not apply to the facts of her case.

Defendants argue Claimant has not met her burden of proving her cervical and lumbar conditions are causally related to her two-year employment with Employer. Instead, they argue Claimant suffered from longstanding degenerative conditions which predated her subject employment. Furthermore, *Nelson* bars her claim because her preexisting condition was not aggravated by a work-related accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. The hearing testimony of witness Corwin Sage;
3. Joint exhibits (JE) 1 through 34 admitted at hearing; and
4. The deposition transcripts of Stephen Hansen, M.D., and Rodde Cox, M.D., taken on September 30, 2022, and October 24, 2022, respectively.

The objection to Dr. Hansen's testimony based on the fact he spoke with Claimant on the day of his deposition, while technically valid, is negated in this instance as it appears the deponent limited his testimony to facts known to him as of the date of hearing. There were no responses from deponent which appeared to be based on information gained from the conversation with Claimant on the day of his deposition. As such, Defendants' objection on this point is OVERRULED, as are all other objections maintained through the depositions.

FINDINGS OF FACT

1. Claimant began working for Employer on November 27, 2017, at 38 years of age. Initially she worked two days per week on twelve-hour shifts. After her first year of employment, she began working three twelve-hour shifts on consecutive days. Her last day of work for Employer was March 13, 2020.

2. Employer is in the business of buying food products from producers and selling them to retailers such as grocery stores. Retailers place orders with Employer, who then fills the orders from stock in Employer's warehouses.

3. Claimant's work position was known as an "order selector" or "picker." Generally, her duties included reviewing orders and gathering the items on the order list. At hearing, Claimant's job was likened to filling a shopping list. After the items on the order list were gathered and secured with plastic wrapping to hold the items together, Claimant would take the product to the docking area for loading. Immediately after dropping off the filled order, Claimant would receive another order and start the process again.

4. Claimant most often used an electric vehicle nicknamed a "mule" (more formally known as an automatic pallet jack) when picking product. A mule has fixed forks near ground level, which carries a pallet on which the product is loaded by hand. The employee operates the mule while standing on a platform facing at a 90-degree angle from the forks. [1] Claimant described the mule's look as a "sideway chariot." Tr. p. 23.

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[1] Joint Exhibit 34 contains photographs and less-than-helpful video footage of the mule and a cherry picker, another machine used by Claimant, and discussed hereafter. A still photograph of the mule at page 760 does show the basic configuration of the machine, but unfortunately the exhibit does not show the mule being operated, so it is not possible to view the operator's body position while working on the machine.

5. Claimant testified that, for safety concerns, when the mule was moving the forks must be to the rear, which resulted in her operating the machine with her head turned to the left. (To visualize, the operator, when facing the steering mechanism and on-board computer screen, would have forks to her right, and the mule would drive "forward" to her left. Basically, the operator stands "sideways" to the machine's path of travel.)

6. The mule incorporated a pressure switch for safety. The operator had to stand (place weight) on the switch, which was located on the platform the operator stood on, in order for the mule to move. If, while moving, the operator stepped off the switch (removed weight from the switch), the machine would stop.

7. To a lesser degree, Claimant also operated a machine known as a cherry picker. That machine had a platform on which the employee would stand, and the platform would raise and lower to reach higher rows of product. The forks and pallet were attached to the rear of the platform. The operator would direct the bucket up to the higher rows of product, load the product onto the forks and lower the loaded forks. The operator utilized a safety harness when operating the cherry picker. The harness straps wrapped around the employee's legs and across the chest, with a lanyard attached to the back of the nylon straps (at about shoulder blade height) with a metal clip to secure the worker to the machine.

8. When operating the cherry picker, the operator is not required to look sideways while moving the machine. Rather, they drive it looking forward, as the controls are at the front of the machine and forks at the rear.

9. In addition to operating the mule and cherry picker while "picking" product, Claimant also, to a lesser extent, processed inbound products, which entailed moving pallets (with a forklift) of incoming items to their proper locations in the warehouse. Working

in receiving, as this was known, was generally considered lighter work than picking, because the employee was not required to lift, stack, or physically handle the product.

10. Considerable testimony was elicited from Claimant and several other employees concerning how much of each day Claimant spent driving the mule, how jolting was the experience, (she claimed one particular machine would abruptly and jarringly stop frequently if her foot was not properly on the pressure plate), how heavy were the products she lifted, and from what height, and a number of other factual matters. Many of Claimant's factual recitations were contested by other employees or former employees called by Defendants.

11. Claimant also testified at length as to her prior state of health concerning her neck and back, past treatment she had received, and why she sought treatment when she did. She discussed her course of treatment once she notified her employer of her neck and back pain, ultimately culminating in arthroplasty surgery at C4-5 and C5-6 by her treating physician Stephen Hansen, M.D. on November 29, 2021.

12. To the extent necessary to analyze this matter and reach legal conclusions, details of certain factual and medical evidence will be discussed below, but ultimately the decision rests on just a few particulars. If not necessary for rendering a decision, background facts and contentions of the parties will not be included herein.

DISCUSSION AND FURTHER FINDINGS

13. Claimant makes her claim for benefits under Idaho Code §72-437, which states,

> When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, *** and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee *** shall be entitled to compensation.

14. An "occupational disease" is defined in relevant part in Idaho Code §72-102(21) as a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment. In order for a compensable occupational disease to exist, it must be one which arises out of and in the course of employment. Further, the employee must be totally incapacitated because of the occupational disease from performing work in the last occupation in which injuriously exposed to the hazards of such disease.

15. Claimant argues she incurred the occupational disease of cervical and (almost parenthetically) lumbar radiculitis while in the course and scope of her duties with Employer and has met all criteria for compensation under Idaho Code §72-437. She further argues the *Nelson* doctrine, discussed below, does not apply to bar her claim.

16. Claimant has the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation is claimed and the occupational exposure alleged to have caused the condition. *Hagler v. Micron Technology*, 118 Idaho 596, 798 P.2d 55 (1990). Proof requires medical testimony that supports her claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Claimant bears the burden of establishing by medical evidence that it is more probable than not that her radiculopathy is causally related to the demands of her work for Employer. Causation must be established by expert medical testimony. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997). To prove that a causal relationship is medically probable requires Claimant to demonstrate that there is more medical evidence for the proposition than against it. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000).

OCCUPATIONAL DISEASE CLAIM

17. In the present case, Dr. Hansen has diagnosed the "condition" for which Claimant seeks benefits as cervical radiculitis or cervical radiculopathy.[2] He opined the radiculopathy was caused by Claimant's work demands. Defendants' position is that Claimant's cervical radiculopathy is the result of the progression of her long-standing degenerative disc disease, osteophyte complex, and resulting stenosis.

18. There is no disagreement over whether Claimant came to the employment in question with degeneration ongoing in her cervical and lumbar spine. Both physicians in this matter, Dr. Hansen and Rodde Cox, M.D., testified that Claimant's cervical and lumbar spine, as shown by a March 2020 MRI, established the fact that Claimant suffered from degenerative changes to her lumbar and cervical spine which, more probably than not, took many years to develop and predated her employment in question.

Dr. Hansen's Testimony

19. In his deposition, Dr. Hansen noted Claimant had cervical stenosis on a preexisting basis. Claimant also suffered from a cervical disc osteophyte complex, which most likely would have begun to develop prior to her work with Employer. Dr. Hansen surgically removed and replaced two of Claimant's degenerated cervical discs (C5 and C6). Those degenerated discs were not caused by Claimant's employment in question. Instead, Dr. Hansen felt Claimant's genetics

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[2] Dr. Hansen testified the occupational disease was cervical radiculitis at times, and cervical radiculopathy at other times. *See, e.g.,* Hansen Depo. pp. 26, 30, 32. In his written report of March 2, 2021, Dr. Hansen indicated his opinion that Claimant's work activities accelerated her lumbar degenerative condition and initiated her cervical radiculitis. In his deposition he testified the condition caused by Claimant's work was cervical radiculopathy. The terms will be used interchangeably herein.

and "environmental factors" were the likely culprits for Claimant's degenerative disc disease. Hansen Depo. p. 34.

20. Dr. Hansen also testified he "definitely would not" have done the surgery if Claimant did not have stenosis. However, the reason for surgery was Claimant's "diagnosis of cervical radiculopathy," which "can be influenced by cervical stenosis" even though the radiculopathy is "its own diagnosis." *Id.* As Dr. Hansen put it, "the real thing I'm treating is the inflamed nerve root of cervical radiculopathy." *Id.* He treated her radiculopathy surgically because she presented with stenosis (due to the disc osteophyte which took years to develop). In short, Dr. Hansen treated Claimant's radiculopathy by surgically addressing her stenosis.

21. Dr. Hansen testified there is no "linear correlation" between the severity of radiculopathy and stenosis. *Id* p. 35.

22. Dr. Hansen conceded it was "possible" that if Claimant's nerve root inflammation (radiculitis) did not improve (or even worsened) for a year or more after ceasing her work activities, that fact would tend to suggest that maybe those activities were not the cause of the inflammation.

23. Dr. Hansen's road to his conclusion that Claimant's work activities "caused" her radiculitis/radiculopathy was not linear. In fact, he originally noted in his medical record dated November 18, 2021, that "[w]ithout a specific injury at work, it will be difficult to ascribe any of these pathologies [C4-5 and 5-6 right-sided stenosis, right shoulder pain, arthritis and impingement, numbness in her right hand and forearm, lumbar disc degeneration, radiculitis, spondylosis and possible SI joint disfunction] to her work demands." JE 19, p. 346.

24. Dr. Hansen later renounced the above statement in a December 16, 2021 addendum, wherein he noted that while Claimant was in the hospital recovering from surgery, he asked her

many questions about her work activities in order to get a "better history about the relationship between her clinical symptoms and her work injury." He relied solely on Claimant to inform his understanding regarding her work activities, without any attempt to verify the accuracy of the representations.

25. Dr. Hansen's understanding, based on Claimant's related version of her work history, included representations that she had to rotate her head constantly while operating a loader at work, and this loader would suddenly jerk and stop on occasions due to "performance issues." When Claimant complained to her supervisor, Dr. Hansen understood Employer's representatives told her to continue with her same duties on the same malfunctioning machine. The Employer's in-house medical staff "discouraged" Claimant from seeking medical care, including an MRI. Instead, Claimant was required to continue working to her physical detriment, "despite her multiple attempts to seek care." Dr. Hansen wrote that "over the years" Claimant's symptoms continued to worsen, "despite her complaints." She finally was forced to obtain an MRI "on her own." Dr. Hansen felt under this scenario, Claimant's requirement to keep working on the defective machinery "is responsible for her clinical condition that ultimately required surgery." JE 19, pp. 346, 347.

Dr. Cox's Testimony

26. Defendants hired Rodde Cox, M.D., a Boise area physical medicine physician, to conduct an IME on Claimant and prepare a written report. He was deposed post hearing.

27. By the time Dr. Cox examined Claimant on June 24, 2022, Claimant had already undergone cervical surgery some seven months earlier. She was still complaining of neck and low back pain which she attributed to her work activities.

28. Dr. Cox's report initially focused on a review of Claimant's past medical history, including Claimant's complaints of neck and low back pain prior to working for Employer. Dr. Cox noted Claimant's initial imaging studies showed findings of multiple levels of degenerative disc disease in her cervical spine and severe facet arthropathy in both her cervical and lumbar spine. Dr. Cox opined that the conditions seen on diagnostic imaging would have taken many years to develop, and most likely predated her work with Employer.

29. Dr. Cox's medical conclusions included his opinion that Claimant's cervical and lumbar spine degenerative changes preexisted her subject employment and there was no causal relationship between her complaints at the time of examination and her previous employment. He also found Claimant presented with multiple nonphysiologic exam findings.

30. In response to an inquiry from Defendants, Dr. Cox noted that by history Claimant spent much of her working time with her head turned to the left, which, if anything, would have "potentially made her more vulnerable to left-sided symptoms rather than right-sided symptoms." JE 22, p. 528.

31. Dr. Cox cited the MD Guidelines, which claims lumbar disc degeneration often begins as early as a person's teens and is not materially affected by minor trauma. The rate of degeneration is largely genetically determined and not predominately the result of occupational and recreational pursuits.

32. According to MD Guidelines, cervical degeneration is also a natural part of aging although previous neck injuries, cervical strains, osteoarthritis, and lifestyle choices such as obesity, smoking, activity-related neck stress, and poor nutrition are modifiable factors associated with an increased risk of cervical degenerative disc disease.

33. At his post-hearing deposition, Dr. Cox noted he had reviewed Claimant's job description, her statements, her supervisors' statements, photos and video of Claimant's work machinery (mule and cherry picker), as well as extensive medical records and diagnostic images. He noted that Claimant was seen by chiropractor Turner in 2016 for lower back pain, and neck pain on an intake form from a Dr. Jeppson in 2011.

34. Specifically addressing the observation made in his report regarding the unlikelihood of right-sided neck injury due to Claimant turning her head to her left, (a notion which Dr. Hansen tried to rebut, and which will be discussed in greater detail below), Dr. Cox testified that turning one's head to the left "may cause more anatomic narrowing of the stenosis that's already there, and that may create more symptoms on that side." Cox Depo. p. 25. He further elaborated on the idea by discussing the medical test known as "Spurling's maneuver." In that test, the physician has the patient tip their head back and then lean it to one side. Anatomically, that narrows the canal where the nerve is located, causing it to pinch and become painful. Claimant's right-sided Spurling's test was positive, meaning when she tilted her head back and to the right it caused right-sided symptoms. Claimant's most prominent degenerative changes in her cervical spine were on her right side.

35. Dr. Cox testified that there was no way Claimant's right-sided disc osteophyte complex resulting in severe right neuroforaminal narrowing was caused by her subject employment. He further testified that Claimant's osteophyte complex led to her stenosis, and the stenosis, or narrowing of the disc space, led to Claimant's radiculopathy, or irritated nerve root.

36. Dr. Cox testified that if Claimant's cervical radiculopathy was due to inflammation of the nerve, as discussed by Dr. Hansen, then an epidural steroid injection should help reduce the inflammation, leading to a positive response. In Claimant's case, the epidural steroid injection

was unsuccessful in reducing her symptoms, which led Dr. Cox to believe Claimant's radiculopathy was "mechanically irritated because of the stenosis or narrowing, as opposed to the nerve being inflamed." Cox Depo. p. 31. Furthermore, if the nerve was inflamed by activity, cessation of the offending activity should lead to improvement, at least hypothetically. However, depending on Claimant's non-work-related activities, if she ceased working for Employer for a year and her symptoms did not improve, that fact would suggest Claimant's symptoms were not caused by her work duties for Employer. If Claimant's symptoms worsened after she quit working for Employer, that fact supports the idea that her complaints were the result of her underlying degenerative process progressing.

Medical Testimony Analysis

37. While there is considerable disagreement between the two testifying medical experts, the dispute can be boiled down to whether Claimant's right-sided radiculopathy is due to inflammation caused by her work activities for Employer, or mechanically irritated due to progressing degenerative disc disease and Claimant's right-sided osteophyte complex which formed over a period of years and predated her work for Employer.

38. Claimant's co-employees testified on matters of Claimant's work activities and history of medical complaints.

Cody Bair

39. Witness Cody Bair was deposed. He worked for Employer from 2009 until 2021, when he left for other employment. In his capacity as warehouse shift lead he was certified on all warehouse equipment, and worked on the mule and cherry picker along with other machinery. Even after he was promoted to warehouse shift manager, he still operated the equipment almost daily.

40. Overtime at Employer was mostly on a volunteer basis, according to Cody (and Corwin Sage, discussed below). (Claimant testified that she was assigned significant mandatory overtime, which is at odds with other witnesses.)

41. Workers at Employer's plant often rotated through various tasks in a 12-hour shift. So, in addition to operating the mule, or the cherry picker, Claimant might work with inbound transfers, where inbound product is sorted and sent on to customers. Inbound transfers, or receiving, is generally lighter work than picking.

42. When a person is operating the mule in a forward direction, the employee will either turn their head or perhaps turn their entire body to the right.

43. According to Cody, the ride on the mule was fairly smooth, but if the pressure plate was deactivated the machinery would abruptly stop. Cody had no recollection of Claimant complaining to him about the mule malfunctioning or coming to a jerking stop. Claimant was on his team toward the end of her employment stint with Employer.

44. When picking, an employee would travel a brief distance to load an item (by dismounting the mule and manually loading the product onto the pallet) then move to the next item on the list and do the same thing. Once the order was complete, the employee would drive the mule to the loading dock, a trip which could take between one and five minutes.

Corwin Sage

45. Employee Corwin Sage was deposed. He was Claimant's lead worker for the entire time Claimant worked for Employer. He interacted with her on a daily basis. He too testified that many times the pickers would rotate jobs through the workday. Primarily this was done to keep them interested and place less physical demand on them. For example, Claimant might pick

on the mule for one day, use the cherry picker the next, and then move to receiving on her third day, or might do more than one of those tasks during a single shift.

46. Corwin was not aware of any mules with mechanical issues as described by Claimant. Employer was diligent in maintaining its equipment.

47. Cory discussed in his deposition how overtime was handled. Most overtime was on a volunteer basis.

48. When an employee is driving the mule forward, she would look to her left. When operating the mule in reverse, she would look to the right. At crossings, the employee would look both ways before proceeding.

49. Both Cody and Corwin testified that the mules are designed as ergonomically as they practically can be. Chronic injury from their operation is rare.

50. From the early days of her employment, Claimant would on some days complain of general soreness from "farm" activities the evening before. Corwin knew she had horses, and having grown up on a farm, he was familiar with being sore. Claimant would not specify where she was sore, and did not mention any specific accident, but at times would request being put on receiving for the day. Later, when discussing her injury with Cody and the company occupational health trainer, Ryan Craig, Corwin overheard Claimant mention that she did not want to make a big deal out of her complaints because "it's not really from here." Sage Depo. p. 70, JE 25, p. 625.

Ryan Craig

51. Ryan Craig is a former employee of Employer. He has a Masters in physical therapy and was an occupational health trainer while working for Employer. He was familiar with the machinery (mule and cherry picker) Claimant operated.

52. February 7, 2020 was the first time Ryan saw Claimant for her complaints. Her complaints that day were solely regarding her low back. She made no mention during this visit of any neck or cervical issues. Ryan recommended Claimant be given duties that would not aggravate her low back and provided her with a back brace. She was assigned receiving tasks with no picking.

53. Ryan testified that Claimant had mentioned picking caused soreness much like, but worse than, when she was doing chores on her property, especially when bending forward. She acknowledged there was no specific injury she sustained at work.

54. In the time he worked for Employer, Ryan did not see many neck injuries. Most of the employee complaints involved shoulders, backs, and wrists, and were, in Ryan's opinion, due to poor body mechanics.

Medical Conclusion

55. As noted previously, Claimant bears the burden of proving, by way of medical evidence, that her neck and low back abnormalities were caused by her work duties for Employer. She relies on Dr. Hansen for such proof. However, Dr. Hansen's testimony is not convincing. While initially he opined that it would be difficult to ascribe Claimant's symptoms to her work activities, he changed his mind and his opinion after speaking with Claimant (while she was in the hospital recovering from surgery) to get her version of how her work activities impacted her neck. He did not review her job description, speak with other employees, view the job site or photographs/videos of the equipment in question, or do any other independent research to assist him in his quest for the "truth." It is not even clear if Dr. Hansen knew for how long Claimant had worked for Employer by the time of her surgery, as he mentioned in his records that Claimant

had been developing her symptoms "over the years" even though she worked part time for Employer for just one year, and full time for about sixteen months.

56. Dr. Hansen's narration of events Claimant experienced at work do not comport with much of the record. For example, he believed Claimant was (finally) forced to seek an MRI on her own, at the end of a confrontational period with Employer's representatives, who made her use defective equipment, discouraged her from seeking treatment, and required her to continue working to her physical detriment. However, Claimant's deposition and hearing testimony does not paint such a bleak picture. In fact, it was Employer's medical provider, Amanda Ward, who suggested Claimant stop working and obtain an MRI. Claimant testified she got the MRI "at Ms. Ward's recommendation. Tr. p. 69. Overall, Claimant's testimony was benign, and did not come across as acrimonious. Dr. Hansen's rendition, which ultimately led him to his conclusion that Employer's insistence on Claimant using defective equipment over her repeated objections was responsible for her medical conditions, painted such a skewed picture that it may well be that his opinion was tainted by his less-than-complete, or even outright incorrect understanding of Claimant's work environment.

57. Even on those points where Dr. Hansen's impression of Claimant's work environment is supported by Claimant's testimony, such as her statements that she had to turn her head to the left while driving the mule, a task which she often undertook for most or on occasion all of her 12-hour shift, or that the mule would often come to an abrupt stop, such statements are not unrebutted. For example, former and current employees testified convincingly that Employer did an excellent job of keeping the equipment in excellent working condition. If there was a mechanical issue with a mule which was brought to management's attention, it was sent to be repaired without delay. It is unlikely Claimant had a malfunctioning

mule, told her supervisor about the issue, and yet nothing was done to repair it. While the mule would stop if and when Claimant took her weight off the pressure plate, it is unlikely an occasional jarring would cause Claimant's radiculitis.

58. Dr. Hansen's explanation of why all of Claimant's symptoms were right sided when she complained of spending much of her work time with her head turned to the left was odd at best. In his deposition he gave a rambling response when asked if he agreed with Dr. Cox that if Claimant had her head turned to the left for prolonged periods of time, she might be more vulnerable to left-sided symptoms rather than right. Dr. Hansen testified,

> If you think about the mechanics of a disc, you have two cylinders, which are bones, and between them is a shorter cylinder, which is a disc, and if you apply rotation to them, it's not just the left side of the structure that is impacted. It's a circle. I mean it's circular. The whole circle is involved, right. [sic ?] So, for instance, if you have a heavy object fall on top of your head and you apply compression to the disc, the disc most likely is going to have problems in all 360 degrees. It's going to compress the whole disc, not just like a piece of a pie. If you rotate to the left, it's not just like the left part of the disc the [sic, is] turning. It's a circumferential process. The whole thing is turning. And so to think that one part of the disc would be more affected then another part of the disc by a rotational maneuver is inaccurate.

Hansen Depo. pp 26, 27.

59. Nothing in that explanation makes clear why if Claimant worked for long stretches with her head turned to the left, the majority of her symptoms would appear on her right side. If anything, under Dr. Hansen's theory, Claimant should have experienced bilateral symptoms. Instead, her symptoms were right sided, which corresponded with her osteophyte complex and stenosis. Furthermore, Dr. Cox did not claim that Claimant should have had left-sided pain by turning her head to the left, only that *if* Claimant was going to have work-related pain from turning her head left, it would be logical to expect Claimant's left side to be more affected.

60. Dr. Hansen's opinion is backed by nothing more than his testimony. He cites to no studies, tests, maneuvers, or even anecdotal evidence to support his claim. When he tried to provide an explanation for his opinion, it actually cut against his position.

61. In contrast to Dr. Hansen, Dr. Cox presented a logical explanation for Claimant's neck and back problems, which correlated with diagnostic studies. His opinions more closely correlated with the facts gleaned from a review of the entire record, including Claimant's own testimony and her medical history, and the realities of her workday, as convincingly explained by her co-workers. Dr. Cox noted Claimant continued to complain of symptoms after she quit working, and even after surgery, did not respond to steroid injections, and her MRI films showed progression of her degenerative disc disease even after she ceased working.[3]

62. When the totality of the record is examined, the preponderance of the evidence establishes that Claimant's right-sided radiculopathy was due to mechanical impingement from long developing stenosis, not inflammation caused in some way by her work duties.

63. Considering the record as a whole, Claimant has failed to establish on a more probable than not basis that her right-sided radiculopathy was caused by her employment for Employer.

64. Claimant has failed to prove by a preponderance of the evidence that she suffered an occupational disease due to the demands of her employment with Employer.

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[3] Dr. Hansen testified that interpreting an MRI can lead to subjective language, and he personally thought there was not that much change between the two MRIs. Dr. Cox found worsening stenosis, and the radiologist who interpreted Claimant's March 31, 2021 MRI found "mildly worsened" osteophyte complex at C4-C5. JE 10, p. 153.

NELSON DOCTRINE

65. It does not appear from the record that any competent medical evidence exists in this case to establish the fact that Claimant's employment in some way aggravated or worsened her preexisting degenerative disc disease to the point of causing right-sided radiculopathy. Dr. Hansen specifically rejected that idea.[4] Dr. Cox likewise did not testify that Claimant's work duties negatively affected Claimant's preexisting disc degeneration. However, even if somewhere in the record there is medical evidence which could be creatively construed as providing evidence that Claimant's work aggravated or worsened her preexisting cervical and/or lumbar disc degeneration, the *Nelson* doctrine, if applicable to these facts, would bar Claimant's claims. The issue is whether *Nelson* applies to this situation even if Claimant can only establish her condition was worsened by her work duties.

66. The *Nelson* doctrine, as it is commonly referred to in the field of workers' compensation, stems from the case of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 879 P.2d 592 (1994), which held that a preexisting condition aggravated or worsened by exposure is not compensable as an occupational disease. A preexisting condition is compensable only if aggravated by a work accident. Therefore, even if Claimant can establish that she meets the requirements for claiming an occupational disease (nature of her employment, disease peculiar to her trade, arising out of and in course of her employment, and total incapacitation), if her condition is due to an aggravation of a preexisting condition, she cannot recover benefits for the aggravation, even where her increased symptoms result in her total incapacitation.

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[4] At page 32 of his deposition, when asked if Claimant's occupational disease was caused, or merely aggravated by Claimant's work activities, Dr. Hansen responded, "Caused." He further testified that "[w]e will never know" if Claimant's stenosis developed prior to working for Employer. *Id.*

67. To determine the applicability of *Nelson*, the first prong of inquiry is to clarify the condition in question to ascertain whether the "condition" preexisted Claimant's employment with Employer, or whether it was a new disease arising out of and in the course of Claimant's employment duties. The "condition" at issue, according to Dr. Hansen and not contested by Defendants, is right-sided cervical radiculopathy. It was determined *supra* that Claimant's employment duties did not cause her radiculopathy, leaving the question of what if Claimant's employment duties merely aggravated or worsened her preexisting degenerative disc disease to the point she began to suffer from radiculopathy.

68. Claimant argues *Nelson* does not apply to her case because her preexisting condition was not a preexisting *occupational disease*, nor was it caused by an *accident.* She argues case authority requires the preexisting condition to be either due to an occupational disease or an accident before *Nelson* applies.

69. Claimant argues that *Sundquist v. Precision Steel & Gypsum,* 141 Idaho 450, 111 P.3d 135 (2005) stands for the proposition that *Nelson* only applies when the claimant had a preexisting occupational disease which had previously manifested and was aggravated by the work conditions the claimant was exposed to while working for defendant employer, *or* the claimant had a preexisting injury from an accident which was aggravated by the claimant's work conditions. Since Claimant herein did not have a preexisting manifested occupational disease, and she had no preexisting conditions from a prior accident, the *Sundquist* holding would prevent Defendants from arguing for the *Nelson* bar to Claimant's benefit claims.

70. *Sundquist* involved a claimant who incurred an occupational disease over the course of multiple successive employments. Thus, the Supreme Court discussed the effect of a preexisting condition which is itself occupational in nature, but not manifest as an occupational

disease at the time the claimant entered an employment where the condition ripens into an occupational disease. *Sundquist* dealt with prior occupational diseases, and therefore the language used therein focused on such conditions. It did not re-define *Nelson* as being applicable *only* in cases where the preexisting condition is occupational in nature. In other words, *when considering prior occupational condition cases*, in order for a preexisting occupational condition to bar a claimant's subsequent occupational disease claim under *Nelson*, the prior occupational condition must have been manifest as an occupational disease.

71. The present case does not involve a claim of prior occupational conditions. Thus, *Sundquist* does not apply, as that case dealt with a specific type of preexisting condition not applicable to the facts of this case.

72. Next, Claimant argues the *Sundquist* Court also held, pursuant to *DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999), that *Nelson* applies not only to preexisting occupational diseases, but also the effects of preexisting *injuries*. Because Claimant suffered from neither a preexisting occupational disease nor the effects of a preexisting injury, *Nelson* does not apply. According to Claimant, only preexisting occupational diseases (manifest) and residuals from preexisting injuries trigger *Nelson.*

73. In *DeMain*, the claimant suffered a remote injury to his low back from a work accident. He subsequently "lit up" that old injury while working for his then-current employer through a series of trauma to his spine in his occupation as a skidder operator. Claimant alleged he suffered from degenerative disc disease in his back, which was characterized by the Commission as a "weakness or susceptibility." The Commission ruled *Nelson* did not apply because Claimant simply had a preexisting weakness or susceptibility, not an occupational condition (such as in *Nelson*) which was aggravated by the demands of his employment.

74. The Supreme Court reversed the Commission, noting the Commission had erroneously failed to apply the *Nelson* holding to the facts.

75. The *DeMain* Court first noted that *Nelson* stands for the proposition that "unless a claimant seeking compensation for the aggravation of a preexisting condition proves that an accident … aggravated the preexisting condition, … the claimant is not entitled to compensation." 132 Idaho 783. The *DeMain* Court specifically rejected the notion that because the claimant's preexisting weakness was asymptomatic prior to his employment, *Nelson* would not apply. Pointing to the earlier case of *Carlson v. Batts*, 69 Idaho 456, 207 P.2d 1023 (1949), the *DeMain* Court noted that *Carlson* specifically discussed the fact that the aggravation of a preexisting "bodily weakness, infirmity or susceptibility" must be due to an accident. The *Nelson* Court, in turn, relied on *Carlson* in reaching its decision. According to the *DeMain* Court, the reliance by the *Nelson* Court on the language found in *Carlson* indicates that *Nelson* extends to all preexisting conditions, including mere weakness or susceptibility.

76. Again, in *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 953 P.2d (1998), the Court noted the "essence of *Nelson* is that a preexisting occupational disease is just like any other preexisting condition. For a current employer to be liable for the aggravation of the condition, there must be an accident. *Id.* at 241.

77. While it is true that the Court in *Sundquist* stressed preexisting occupational diseases and accidents as falling under the rule of *Nelson*, nowhere did the Court specifically state that only occupational diseases and accidents are subject to *Nelson.* Likewise, our Supreme Court has not declared that a preexisting condition which is not occupational, or the result of an accident, would not be subject to *Nelson.* In fact, in *Reyes*, the Court noted that for an employer to be liable for the aggravation of *any* preexisting condition, there must be an accident. 131 Idaho 241.

78. Because Claimant's preexisting cervical and low back[5] conditions were not caused by an accident arising out of and in the course of employment with Employer, the *Nelson* doctrine bars Claimant from seeking benefits for an occupational disease.

79. Claimant has failed to show by a preponderance of the evidence that any aggravation or worsening of her degenerative disc disease leading to cervical radiculopathy is not barred by the holding in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 879 P.2d 592 (1994).

CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that she suffered an occupational disease due to the demands of her employment with Employer.

2. Claimant has failed to show by a preponderance of the evidence that any aggravation or worsening of her degenerative disc disease leading to cervical radiculopathy is not barred by the holding in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 879 P.2d 592 (1994).

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[5] While Dr. Hansen made a conclusory statement that Claimant's lumbar issues were related to her work duties, he admitted in deposition that he would have to qualify his opinion on the cause of Claimant's lumbar spine condition because he only assessed her lumbar spine on her initial visit with him. As a result, he was "a little hesitant to make judgment calls" based on anything "other than [Claimant's] neck, because that's what I've been focusing on. *** "But to be honest with you, I really haven't explored things (Claimant's shoulder, low back, and right upper extremity) very deeply, but that was my initial impression (that all these ailments were due to Claimant's work duties.)" Hansen Depo. pp 20, 21. Whether this testimony meets the threshold of Claimant's burden of proof on medical causation is highly doubtful, but unnecessary to decide given the findings herein. It should also be noted Claimant made almost no argument regarding the medical causation of Claimant's lumbar spine. All the emphasis at hearing, in depositions, and in briefing was focused on Claimant's cervical spine.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 13th day of June, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MIRINDA SIOUX SMITH, Claimant, v. DOT FOODS, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2020-007874** **ORDER** FILED JUL 03 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own. Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove by a preponderance of the evidence that she suffered an occupational disease due to the demands of her employment with Employer.

2. Claimant has failed to show by a preponderance of the evidence that any aggravation or worsening of her degenerative disc disease leading to cervical radiculopathy

is not barred by the holding in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 879 P.2d 592 (1994).

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this the 30th day of June, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:
Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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